

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON**

UNITED STATES OF AMERICA, : :

Plaintiff, : Case No. 3:09-CR-137

vs. : Judge Walter H. Rice

DAVID SCOTT, : :

Defendant. : **SENTENCING MEMORANDUM**

DAVID SCOTT (“Mr. Scott”), through counsel, respectfully submits this Memorandum for the Court’s consideration. Mr. Scott is scheduled for sentencing May 13, 2010. The following facts and information support a sentence below that recommended by the Guidelines, and one that would comply with the purposes set forth in 18 U.S.C. §3553 that are to be considered when imposing a sentence.

Nature and Circumstances of the Offense

In order to understand the nature and circumstances of this case, it is necessary to understand something about a 20-year-old case from Preble County involving David Scott's older brother, Billy Scott (the venue was actually moved to Butler County because of pretrial publicity).

Billy Scott was convicted of rape and murder for conduct that occurred in Preble County July 7, 1990. David Scott and the rest of the Scott family have maintained that Billy Scott is innocent, and they have done everything in their power to see that his conviction is reversed. For the past 20 years, David Scott has maintained that he was with his brother on the night of the murder and knows that his brother could not possibly have committed the murder. David Scott has been very involved in

fighting to prove his brother's innocence, and David Scott also testified at his brother's trial, where he and others provided an alibi for his brother.

The Scott family odyssey is detailed on their website "<http://www.clearbillyscott.com/>." It is apparent that Billy Scott's conviction has taken a tremendous toll on the Scott family. Billy Scott has exhausted all of his appeals. Recently, the Ohio Innocence Project has opened up an investigation into Billy Scott's case. Undersigned counsel spoke with an attorney with the Innocence Project who confirmed that she was in communication with the Scott family and that the investigation into the case was open and ongoing.

Several prosecution witnesses have apparently recanted their testimony, and David Scott believes that these witnesses who testified against his brother were all coached and were made promises in exchange for their testimony. It is not the intention of this sentencing memorandum to argue or even suggest that Preble County officials framed Billy Scott for rape and murder. It is important, however, that the Court be made aware of the nature and circumstances surrounding the facts that have led David Scott and his family to feel that Billy Scott has been wrongfully imprisoned for a crime he did not commit.

Filed separately are a few of the many documents David Scott and his family have provided to undersigned counsel regarding Billy Scott's case. The first attachment is a hand written letter purportedly from Gary Heath. In this letter, Mr. Heath claims that a Preble County investigator bought his fabricated grand jury testimony against Billy Scott with secret promises including a sentence reduction. Mr. Heath identifies the investigator who purportedly bought his testimony as the investigator identified in this case as D.L., the recipient of the phone calls and the victim in this case.

Similarly, the second exhibit is identified as an e-mail message from Anthony Young, who was the sole eyewitness in Billy Scott's case who placed Billy Scott with the murder victim at the time of the murder. According to David Scott, Anthony Young has also claimed that this same Preble County investigator coached him to fabricate testimony against Billy Scott. Again, these exhibits are included not to suggest that the Preble County investigator who is the victim in this case actually bought or manufactured evidence in the case against Billy Scott. Rather, these exhibits are included to explain how David Scott grew to *believe* this investigator framed his brother.

As previously indicated, the Scott family has created a website which thoroughly analyze these issues and the many other issues they believe establish that Billy Scott was denied a fair trial and denied a fair appellate process. In addition, David Scott has provided undersigned counsel with numerous newspaper articles, legal pleadings, and even a book written by a victim of the aforementioned Gary Heath. What is clear from examining these documents is that the Scott family has devoted themselves completely to trying to clear Billy Scott, and they have done so by pursuing every available legal challenge to Billy Scott's conviction. Unfortunately, with the failure of these legal efforts, David Scott crossed a serious line separating advocating for his brother's innocence and violating the law.

Offense Conduct

After all of Billy Scott's appeals had been exhausted, David Scott's frustration and anger grew to the point where he made the threatening phone calls that are the offense conduct of this case. David Scott made these calls to the investigator referred to as D.L. because he has been led to believe that this investigator coached and helped fabricate false testimony that was used to convict his brother. Importantly, however, at no time did David Scott intend to carry out these threats, and there

is no evidence that David Scott made any plans to travel, or ever intended to travel from his home in Tennessee to carry out these threats here in Ohio. Nor is there any history of violence in David Scott's past, or anything in his past to suggest that he would carry out the threats that he made.

David Scott believed that by making these threats he would eventually force attention to his brother's case, and by doing so he would expose what he and his family perceive as the injustice surrounding his brother's prosecution and conviction. David Scott now recognizes how serious an offense making these threats were – even though he never intended to carry out the threats. He also did not believe that D.L. took the threats seriously, as they have been having ongoing heated conversations concerning his brother's case for many years. He certainly had no idea that he was committing a federal felony offense. As captured in paragraph 39 of his PSI, David Scott has stated that "I never would have hurt the individual I threatened. I did it the wrong way, but I just wanted him exposed."

Felony Conviction

Mr. Scott has lived a law abiding life, and this conviction is Mr. Scott's only felony conviction. As such, this felony conviction will go far in reflecting the seriousness of the offense. As a convicted felon, Mr. Scott will suffer all of the collateral consequences that accompany a felony conviction. Mr. Scott is currently employed, but if he loses his employment, employment opportunities will be much more difficult if not impossible to obtain. Furthermore, the mere filing of the felony charges against Mr. Scott have resulted in a cessation of him making threatening phone calls. He has been in full compliance with U.S. Pretrial Services, and it appears that he fully appreciates the seriousness of the offense.

Conclusion

For the above reasons, a sentence below the suggested Guideline range is sufficient, but not greater than what is necessary to meet the sentencing goals. Specifically, a sentence below the applicable range is sufficient and not greater than is necessary to punish, rehabilitate, promote respect for the law and deter future criminal conduct.

Respectfully submitted,

STEVEN S. NOLDER,
FEDERAL PUBLIC DEFENDER

s/F. Arthur Mullins
F. Arthur Mullins (0080483)
Assistant Federal Public Defender
1 South Main Street, Suite 490
Dayton, Ohio 45402
(937) 225-7687
Art_Mullins@fd.org
Attorney for Defendant
DAVID SCOTT

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon Assistant United States Attorney Brent Tabacchi, by electronic filing, this May 6, 2010.

s/F. Arthur Mullins
F. Arthur Mullins